No. 91-206

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHILDREN OF BEDFORD, INC., and
MACMILLAN, INC.,

Petitioners,

vs.

ANGELO PETROMELIS, GENNARO A. FISCHETTI,
GEORGE L. GROBE, JR. and DIANE MCGRATH,
constituting the CRIME VICTIMS BOARD
OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE NEW YORK COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the New York "Son of Sam" law invalid under the First Amendment, in view of the fact that the law prohibits authors who are arrested for or convicted of a crime, or who admit to the commission of a crime, from obtaining royalties for writing about the crime, requiring instead that the proceeds be made to the New York Crime Victims Board to compensate victims, inasmuch as the law (a) prohibits payment only for speech of certain specified content; (b) makes provision to compensate victims only from payments for speech, leaving crime victims to their ordinary remedies to reach all other assets of criminal tortfeasor; (c) has in fact deterred the creation and publication of speech and reaches so broadly as to restrict a potentially significant range of writing about important issues in our society, and (d) the state interests asserted in defense of the law are not served by the law in question.

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ANGELO PETROMELIS ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioners Children of Bedford, Inc. and Macmillan, Inc. respectfully pray that a writ of certiorari issue to review the judgment of the New York Court of Appeals, entered May 7, 1991.

OPINIONS BELOW

The decision of the New York Court of Appeals (Appendix, infra, 1a-29a) is reported at 77 N.Y.2d 713, 573 N.E.2d 541, 570 N.Y.S. 2d 453 (1991). The decision of the Appellate Division, First Department (30a-31a) is reported at 161 A.D.2d 503, 556 N.Y.S.2d 483 (1st Dept. 1990). The decision of the Supreme Court, New York County (32a-52a) is reported at 143 Misc. 2d 999, 541 N.Y.S.2d 894 (Sup. Ct., N.Y. Cty. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment I and XIV.

New York Executive Law section 632-a, commonly known as the "Son of Sam" law, is reproduced in the Appendix at 59a-65a.

STATEMENT

This case raises the same fundamental First Amendment question that the Court has decided to address in Simon & Schuster v. Members of the New York State Crime Victims Board (No.90-1059), cert. granted, 111 S. Ct. 950 (February 19, 1991). As in the Simon & Schuster case, this suit involves a First Amendment challenge to New York's "Son of Sam" law (New York Executive Law § 632-a).

In this case, the book at issue, Stranger In Two Worlds written by Jean Harris, was a serious and provocative study of life in a woman's prison which received considerable critical praise. [1] It did not seek to

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[1] The book received favorable notices and appeared for a time on The New York Times Best Seller list. The review in the New Yorker magazine stated: "Her book ...is an extremely intelligent firsthand account of how two institutions -- the school and the prison -- function in modern America." (Court of Appeals Appendix, "A"-324) The New York Times reviewer wrote: "Jean Harris's work is clearly an authentic product of her own hand and mind, a work she needed to write out of that deep propulsion from which literature springs. And, in the second portion, where she

"exploit" the crime of which she was convicted -- indeed the only mention of the crime in the book was through quotation from the trial transcripts. But because of the broad sweep of the New York law, which has been largely followed in over forty states and by the federal government as well, any mention of the crime by a criminal-author invokes the heavy regulatory scheme requiring attachment of all the funds earned by the book. The wide range of the law treats any discussion of a crime by a criminal-author, no matter what other value the work might have, as an exploitative act. The law would catch within its reach books such as Henry David Thoreau's On Civil Disobedience, Malcolm X's Autobiography, Martin Luther King's Where Do We Go From Here, as well as many other notable works of American literature. A law that would have any such effect requires the most careful examination by this Court.

The Statutory Background:

The New York Executive Law Section 632-a is directed solely at monies earned by the exercise of the rights of free speech and free press. It applies to all contracts for a book, movie, magazine article, or play written by a person accused of a crime with respect to the "reenactment" of the crime or to the accused's thoughts, feelings, opinions, or emotions regarding a crime. A person who confesses or "voluntarily admits" to a crime is covered by the law, even if he or she is never convicted of the crime, or could not be convicted,

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describes prison life, she produces an important and original document." (A-325) The Ms. Magazine review read: "She has made something bad into something very good...and this is the most important lesson. In her book, she earns our attention and concern by the narration of her own story, and then, as she had hoped, we read the second half about the women in prison with surprise, shock and concern." (A-327)

because of the statute of limitations or for any other reason.

Any contract for such a work must be provided to the Board. If a work is found to be within the law, all proceeds from the contract must be paid to the Board, which places the money in an escrow fund for the benefit of a victim of the crime. (Section 632-a (1)). The victim must bring a regular tort action against the perpetrator within five years after the money has been deposited. Upon securing a judgment, the plaintiff-victim may reach the money placed in the fund. Even if the statute of limitations has already run for an ordinary tort action, the deposit of the money by the Board revives the cause of action which then has another five years to run. If no victim brings such an action within five years, the money is then paid to the criminal-author. (Section 632-a(4)).

Only the proceeds of a book, article, movie or play are covered by the law. If the criminal obtains money from any other source -- inheritance, investments, exploitation of any skill acquired from criminal activity (such as learning how to break a lock or break into a computer data bank) -- the law does not attempt to reach such funds. The law is designed only to reach the proceeds from First Amendment activity.

The Legislative History:

The "Son of Sam" law was inspired by the fear that the notorious criminal who operated under that name in the late 1970's would reap the benefits of the publicity surrounding his actions and would make a fortune from selling his story. The first case interpreting the law noted that the law was "conceived in haste, written in haste, and declared under the cry of the public for the Legislature to exact retribution...." In the Matter of Johnsen (Berkowitz), 103 Misc.2d 823, 825 (Sup. Ct. Kings Cty. 1979). The law was adopted by the legislature in the summer of 1977 before David Berkowitz was apprehended, and it was signed by Governor Carey into law on the day after Berkowitz was

arrested. A later court decision noted that the Division of the Budget had advised that the law was "terribly drafted," and should be vetoed, Barrett v. Wojtowicz, 66 A.D.2d 604, 611 (2d Dept. 1979).

Statement of Facts:

Petitioner Children of Bedford, Inc. is a not-for-profit corporation, organized under New York law (A-100). It is the assignee of all the royalties payable to Jean Harris under a book contract, dated March 19, 1985, which she signed with Petitioner Macmillan, Inc., a leading New York publisher, for publication of her book entitled Stranger in Two Worlds. (A-82 and A-116).

After her imprisonment in 1981 in Bedford Hills Correctional Facility for the killing of Herman Tarnower, Ms. Harris began working at the Children's Center at the prison with the children of the women imprisoned in that facility. (A-274-75). Ms. Harris thought it was important to bring to the attention of the public the problem of imprisoned mothers trying to maintain their bonds with their children. To that end, she considered editing a book composed of correspondence between imprisoned mothers and their children. She later arranged for the incorporation of Petitioner Children of Bedford to obtain the funds from the book to use for the purposes of educating the children of her fellow inmates or former inmates of Bedford Hills.

A literary agent acting on behalf of Ms. Harris tried to sell the project to various publishers, but they were not interested in publishing only such letters. Some publishers suggested that the project would be more salable if Ms. Harris were to write her own story as well. She then expanded the manuscript to include the story of her early life and her prison experiences, into which she incorporated some of the children's letters.

She then submitted an outline of the proposed book to various publishers, which contained the story of

her early life, her life in prison as well as letters from the children and the story of their relationship with their mothers. Among those contacted was Macmillan, Inc., one of the largest and most prominent book publishers in America, which eventually agreed to publish the work. It was published in the Spring of 1986.

The only sections or chapters of the book that contained any reference to the crime or Ms. Harris' thoughts, opinions, feelings or emotions about the crime were two chapters that quoted from the trial transcripts. Nevertheless, on July 28, 1986, the New York Crime Victims Board began a proceeding, pursuant to its regulations, to declare that the book was subject to Executive Law Section 632-a on the ground that it "reenact[ed] ..[the] crime" and described the "convicted person's thoughts, feelings, opinions or emotions regarding such crime."

Hearings were then held before the Board. On October 26, 1987, the New York Crime Victims Board upheld its proposed order and determination and issued a final order finding that the book Stranger in Two Worlds fell within the purview of the statute and requiring all moneys paid under the agreement to be paid over to the Board. A proceeding under Article 78 of the New York CPLR was commenced by Petitioners in Supreme Court, New York County, seeking a stay of the effectiveness of the Board's order and seeking to have Section 632-a declared unconstitutional.

The Supreme Court upheld the validity of the law. (32a-52a). With respect to the First Amendment argument, the Court found that the law "does not prohibit a person convicted or accused of a crime from engaging in conduct designed to communicate the details of the crime." (42a). The law simply "affects the right of a perpetrator to receive any profit from" writing about the crime. (42a) The court found that the attempt to reach only the funds from expressive activity did not violate the First Amendment and that there was no "differential burden imposed upon protected expressive

activity." The Court also found that the effort to compensate victims was an important state interest and the attempt to do so from only literary efforts was "narrowly tailored to a compelling state interest." (47a).

By order dated April 25, 1990, the Appellate Division, First Department, affirmed the order of the Court below, without opinion. (30a).

On Appeal to the New York Court of Appeals, that Court affirmed (1a-29a). It found that "the statute is content based and imposes a direct burden on speech." (13a). It noted that the law "imposes an economic disincentive or penalty for delivering [the speaker's message]." (15a). Therefore the strict scrutiny test must be applied. But the Court found three compelling interests served by the law. First, victims can receive compensation directly from those who injured them. Second, the law "preserve[s] the victim's equitable right to assets earned by a criminal a a result of the victimization." (16a-17a.) Viewed from another perspective, the "statute is a codification of the fundamental principle that criminals should not be permitted to profit from their wrongs." (18a) Third, the law advances the victim's interest in achieving "retributive satisfaction" by further punishing the criminal. (18a)

Having identified these interests as compelling, the Court of Appeals concluded that the law is narrowly tailored to achieve those interests. Other provisions for compensating victims were inadequate, since a criminal may not have attachable assets at the time of the crime or shortly thereafter. Criminals "create, by illegal activity, a new product -- a story -- which becomes profitable in the retelling." (23a) That asset should be reachable by the victim, according to the Court.

REASONS FOR GRANTING THE WRIT

As in the Simon & Schuster case in which this Court has already granted certiorari, the Court below -- in this case the New York Court of Appeals -- misapprehended the decisions of this Court governing the application of strict judicial scrutiny in review of statutes that discriminate on the basis of the content of expression and the identity of the speaker. Both the Court below here and the Second Circuit Court of Appeals in Simon & Schuster, recognized that a significant burden is placed upon First Amendment rights by a law of this kind, which destroys the economic incentive of an author to engage in expressive activities. Thus both courts concluded that the law substantially burdens the exercise of First Amendment rights.

But both Courts then misapplied the strict scrutiny test and watered that test down to the point where it resembles the modest level of judicial scrutiny -- the "rational relationship" test -- applied by this Court in equal protection cases where neither a fundamental right nor a suspect category is implicated. That is, both Courts simply accepted the rationales offered by the State to support the law without any serious inquiry as to whether the interests asserted are indeed served by the law and whether the law in question sweeps so broadly as to seriously erode First Amendment protections. Accordingly, this Court should grant certiorari review in this case as it has done in Simon & Schuster or, in the alternative, the Court should postpone consideration of this petition until the Simon & Schuster case is decided and then dispose of this suit in accordance with the decision in that case. See, e.g., Keney v. New York, 388 U.S. 440 (1967). Petitioners' reasons for reaching these conclusions are amplified below.

I. IN UPHOLDING NEW YORK'S SON OF SAM LAW THE NEW YORK COURT OF APPEALS MISAPPREHENDED AND MISAPPLIED WELL-ESTABLISHED FIRST AMENDMENT DOCTRINE.

At the heart of the First Amendment is the notion that public debate and discussion should be encouraged and that laws limiting expressive activities are strongly disfavored. To that end, this Court has developed a variety of First Amendment doctrines designed to foster an environment conducive to the free flow of ideas.

One such doctrine holds that under the First Amendment, government is prohibited from penalizing or burdening speakers based upon the content or viewpoint expressed by the speaker and that such content-based laws are presumptively unconstitutional. As this Court observed in Police Department v. Mosley, 408 U.S. 92, 95 (1972), "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

First Amendment doctrine further recognizes that when government burdens the financial aspect of a First Amendment enterprise, it inevitably burdens the underlying expressive activity, as well. Meyer v. Grant, 486 U.S. 414 (1988); Riley v. National Federation of the Blind, 487 U.S. 781 (1988); Thus, in Meyer v. Grant, supra, this Court reviewed the constitutionality of a Colorado statute that prohibited proponents of a ballot initiative from paying individuals to circulate petitions in support of the ballot initiative. Colorado placed no restriction on the number of people who might circulate the petitions or the manner in which they might be circulated. The statute simply prohibited petition circulators from being paid for such activity. Nevertheless, this Court recognized that the statute substantially burdened First Amendment rights of petition and association. The Court, consequently, evaluated the statute against the requirements of strict

judicial scrutiny and, in so doing, unanimously invalidated the Colorado enactment.

This Court has also recognized that, under the First Amendment, the State may not impose special financial burdens upon those engaged in expressive activity where the financial burdens are not evenly imposed at the same time upon all other commercial enterprises. See. e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm. of Revenue, 460 U.S. 575 (1983); Arkansas Writers Project v. Ragland, 481 U.S. 221 (1987); Texas Monthly Inc. v. Bullock, 109 S. Ct. (1989). As this Court recently observed in Leathers v. Medlock, 111 S. Ct. 1438, 1443-44 (1991):

> 'These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. . . . The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. . . . Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

Each of these First Amendment doctrines is implicated by the present controversy. For the New York "Son of Sam" law is plainly content, viewpoint and speaker-based in its discrimination. It applies only to certain individuals who have been accused of, or convicted of, or have confessed to, criminal activity. And, even then, the statute applies only if the individuals write or talk about their criminal activity. Moreover, the

statute imposes a substantial burden upon the financial component of a First Amendment enterprise. It dictates that an author who has committed a crime and who chooses to write about the crime can do so, but must defer receiving any financial benefits from the book for at least five years. Finally, New York's "Son of Sam" law imposes a differential burden upon accused, convicted or confessed criminals who acquire assets through a First Amendment enterprise. Rather than require that all assets acquired by a criminal be made available for crime victims, the New York statute is limited to assets obtained through the sale of a book, movie or television account of the crime. For all of these reasons, the New York statute can only be applied if it survives strict judicial scrutiny. It can only be upheld if it is "narrowly tailored" in the pursuit of "compelling" societal interests.

In this regard, the New York Court of Appeals correctly concluded that the statute is "content-based and imposes a direct burden on speech." (13a). And upon this conclusion, the Court below purported to apply strict judicial scrutiny in evaluating the constitutionality of the statute. In fact, the Court applied a form of scrutiny that was strict only in name but deferential in reality. The Court of Appeals announced that in defense of the "Son of Sam" law, the State "must demonstrate that [the statute] serves a compelling state interest and is narrowly tailored to achieve that purpose." (15a) In reality, however, the Court below accepted as justifications for the New York statute, interests that cannot be regarded as sufficiently compelling to outweigh the First Amendment rights of Petitioners. And, even allowing that one of these interests identified by the State can be viewed as "compelling," the Court below failed to insist that the "Son of Sam" law must be narrowly tailored in the pursuit of that interest.

The Court of Appeals identified three interests upon which the statute purports to rest: first, an interest in compensating crime victims; second, an interest in preserving "the victim's equitable right to assets earned

by the criminal as a result of the victimization;" (16a-17a) third, the community's interest in achieving "retributive satisfaction" from punishing the criminal (18a). As explained below, the first of these interests -- while perhaps "compelling" -- is not genuinely or realistically advanced by the New York statute. The second and third of these interests while holding some superficial appeal cannot, upon closer scrutiny, be viewed as sufficiently compelling to justify the First Amendment burdens created by the statute.

The desire to compensate crime victims for injuries flowing from the unlawful conduct of a criminal may well be regarded as a compelling societal interest. But, the New York "Son of Sam" law can hardly be viewed as a serious legislative effort in this regard. For the law is seriously under-inclusive as a restitutional measure. The law has been applied less than ten times in its entire 12 year history and the number of victims actually obtaining compensation is miniscule. If New York were genuinely interested in providing complete compensation for crime victims from criminals who injured them, it would not limit its law to the profits of books, movies and television shows, which have produced a pitifully small amount in its entire history, but would, instead, make all of the criminal's assets available to the crime victims.

So understood, the New York statute cannot be regarded as a statute carefully and appropriately enacted in the pursuit of the State's restitutional interests. Even allowing that victim compensation is a compelling governmental interest, this statute cannot be justified upon that ground for it is so inadequate and so under-inclusive in its reach, that it can hardly be said to serve that interest at all.

Indeed, the fact that New York has so limited the statute to expressive activity suggests, quite strongly, that interests other than restitution far better explain the legislative purpose of the "Son of Sam" law. Those interests are described by the Court of Appeals below as

"a desire to preserve the victim's equitable right to assets earned by the criminal as a result of the victimization" (16a-17a) and a desire to further punish the criminal in order to provide victims with "retributive satisfaction." (18a) Upon close scrutiny, however, these interests cannot justify burdening First Amendment interests in the way that the "Son of Sam" law does.

The "desire to preserve the victims equitable right to assets earned by the criminal as a result of victimization" seems to encompass two conceptual propositions, as explained by the Court below: first, that "it is ... wrong for criminals to commit crimes and profit from them;" and, second, that it is "also wrong for criminals to salt their victims' wounds by profiting from the victimization without recompense to the victims." (18a).

Neither of these equitable concepts can support the New York statute. The first of these concepts is inapplicable because in no sense can a book about a crime be viewed as the "fruit" or the profits from a crime. It is, of course, true that if the crime had not been committed, the book about the crime would not have been written. But there are numerous "triggering events" that may inspire or produce the basis for a book or work of literature. Marcel Proust may never have written his Remembrance of Things Past if he had not tasted a madeleine sold to him by a local baker, W.B. Yeats would not have written his moving love poetry if he had not been rejected in his youth by Maud Gonne, Herman Melville might not have written Moby Dick if he had not been hired out as a seaman, and Ronald Reagan would not have written his memoirs if he had not run for and been elected President. But that does not make each of the works a "fruit" of the events described, except in the sense that an event must occur for an author to be able to write about it.

For the Court below to say that criminals "create, by illegal activity, a new product -- a story -- which becomes profitable in the retelling" is to totally distort

the process of expressive activity. It is the writing of the work that creates the profit, not involvement in the events described in the writing, and it is the profits of that writing that are reached by the law. If there were no book written by the criminal, then the "product" -- the "story" "create[d] by illegal activity" -- would have no value. Only when an author writes is value created, and the value therefore comes only from the writing.

Applying reasoning similar to that accepted by the New York Court of Appeals, Ronald Reagan created an asset by running for and being elected President. His activities as President, for which we paid him, gave him the basis for writing his book, from which he profited handsomely. But the United States has no claim to his royalties because it is generally accepted that his independent act of literary creation was the basis for his literary profits. That independent act broke the chain of causation between his governmental service and the profits from his writing. The situation is exactly the same when a criminal writes a book about his or her crime.

More generally, it is also true that if the crime had not been committed, any number of other acts in the criminal's life would not have occurred. Virtually every significant act in one's life has a transforming effect that influences subsequent events. But, we do not normally insist that one event is the "fruit" of another unless the causal connection is direct and the second event is a necessary consequence of the first. So understood, a book about a crime cannot be viewed as the "fruit" of the crime. Unfortunately, many people commit crimes. But very few of the criminals write books about the crimes. Thus, the writing of the book must be regarded as a separate and independent literary act which is not a necessary consequence of the commission of the crime.

The second equitable concept is equally inadequate as a justification for the present law. The concern of the Court of Appeals for the "salting of the victim's wounds" is in fact, a concern that the

reenactment or description of the crime by the criminal will force the victim to relive the events of the crime and thus be reinjured, albeit in some smaller way. But, seen in these terms, the focus of the statute is upon the reenactment or the renewed portrayal of the crime at the expense of the victim. And, in this regard, the statute's concern for the portrayal of the crime is, in the end, a concern that the content of the criminal's expression will offend the sensibilities of the victim. But, it is an axiom of the First Amendment that expression cannot be curtailed simply because its content will offend the sensibilities of other persons. Thus in Texas v. Johnson, 491 U.S. 397, 414 (1989), this Court observed:

> "If there is a bedrock principal underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

Finally the state's interest in punishing the criminal in order to provide "retributive satisfaction" for the victim or for society cannot serve to justify the statute. In Gertz v. Welch, 418 U.S. 323 (1974), this Court reviewed the constitutionality of an Illinois statute that permitted the imposition of punitive damages in defamation suits. This Court undertook the examination of the punitive damages issue as part of its broader effort to craft a constitutionally-driven jurisprudence of defamation law that strikes an appropriate balance between the compelling First Amendment interest in safeguarding free expression and the competing social interest in remedying reputational injury. The Gertz Court responded to this problem, on the issue of punitive damages, by observing that, at least where the speech concerns public issues, "states have no substantial interest in securing for plaintiffs ... gratuitous awards of money damages far in excess of any [restitutional interest in remedying] actual injury." Id. at 350. Thus, the Gertz Court distinguished between using the defamation law for compensatory and punitive purposes and held "that the states may not permit recovery of

presumed or punitive damages, at least when liability is not based on a showing of knowledge or falsity or reckless disregard for the truth."[2] Id. at 350.

The essential distinction drawn by the Gertz Court between using the defamation laws to compensate for reputational injury and the use of libel laws simply to punish speech is equally applicable here. For in this case there is no doubt that Petitioners' book focuses on a matter of public concern. See footnote 1 above. Nevertheless the New York statute reaches such discussion of public issues and "punishes" a criminal author for discussing them. The law makes no effort to exclude discussion of the most serious public matters if the crime is also described in the work. Yet, as noted above, New York's "Son of Sam" law is so underinclusive as to belie any serious claim that it seeks to curtail speech about public issues only for a restitutional purpose. There being no adequate restitutional justification for the statute, New York's "Son of Sam" law must be seen as resting upon retributional interests, as the court's discussion of a victim's "retributive satisfaction" indicates. And in this regard the statute violates the principles set forth by this Court in Gertz. Punishment of constitutionally protected speech about matters of public concern simply for the sake of punishment violates the First Amendment.

II. THE LAW IN QUESTION SERIOUSLY BURDENS SPEECH.

The burden upon speech imposed by the law is obvious. Undisputed affidavits in the Simon & Schuster case shows that book publishers have been seriously deterred in publishing books that might fall within the

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2 In Dunn & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985), this Court made clear that the holding in Gertz is limited to situations where the defamatory speech addresses an issue of public concern.

reach of the law in question. Some publishers are avoiding these types of books altogether, and others have greatly changed the manner in which they do so. See Joint Appendix in Docket No. 90-1059, 26-28, 30-33, 34-35, 37-41, 42-43, 45-47.

In addition, one has only to examine a list of the books that would fall within the reach of the law now had it been in effect at an earlier time. Among the writers who have been incarcerated for crime and whose autobiographies would presumably fall within the reach of the law are Francois Villon, Sir Thomas More, Cervantes, Sir Walter Raleigh. John Donne, Daniel Defoe, Voltaire, Diderot, Henry David Thoreau, Oscar Wilde, Jack London, Robert Lowell and Bertrand Russell. See Franklin, Prison Literature in America (Oxford University press, expanded edition, 1989) for a list of hundreds of books written by criminal authors, many of which have enriched our culture. Any law that has the potential to restrict or deter the writing and publication of so wide a range of literature must be given the most careful examination.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted, or, in the alternative, the Court should postpone consideration of this petition until the Simon & Schuster case is decided and then dispose of this suit in accordance with the decision in that case.

Respectfully submitted,

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APPENDIX

State of New York
Court of Appeals

1 No. 77

In the Matter of Children of Bedford, Inc. et al.,

Appellants,

v.

Angelo Petrolmelis et al.,

Respondents.

OPINION

This opinion is uncorrected and subject to revision
before
publication in the New York Reports.

Leon Friedman for appellant.
Susan L. Watson, for respondent.

SIMONS, J.:

Jean Harris is the author of a book entitled "Stranger in Two Worlds". She has assigned the royalties due from her publisher, petitioner MacMillan, Inc., to petitioner Children of Bedford, Inc., a

not-for-profit corporation organized under New York law. Respondents are the Chair and members of the Crime Victims Board of the State of New York. On October 26, 1987 respondents issued an order declaring that royalties for Harris' book must be deposited in escrow because the book contains her version of the killing of Dr. Herman Tarnower, a crime which resulted in her conviction of second degree murder (see, People v Harris, 57 NY2d 335), as well as expressions of her "thoughts, feelings, opinions or emotions" regarding the crime (see, Executive Law § 632-a[ll).

Consequently, petitioners instituted this article 78 proceeding asserting that the book was not subject to the statute, that the proceedings judging it so violated federal due process guarantees and that the statute abridged federal and State guarantees of free speech (US Const, 1st Amend, 14th Amend; NY Const, art I, § 8). Supreme Court converted the proceeding to a declaratory judgment action and, after examining the book's contents, found that the statute applied to the work and that respondents had not violated petitioner's due process rights. The Court held further that the statute was constitutional because it had only an incidental effect on speech and because the governmental interest addressed by the statute

outweighed petitioners' State and federal rights (see, 143 Misc 2d 999). The Appellate Division affirmed on Supreme Court's opinion.

We agree that the book is subject to the statute and that the proceedings did not violate petitioners' due process rights. We also agree petitioners' free speech claims should be rejected. Our analysis differs from that of Supreme Court, however. We conclude that the statute is content based and imposes a direct burden on speech: it singles out a category of speech based on subject matter and imposes special burdens on that category. Thus, the statute must be strictly scrutinized and unless it serves a compelling governmental purpose and is narrowly tailored to accomplish that purpose, it is invalid.

I

In 1966 the Legislature enacted Article 22 of the Executive Law to establish the Crime Victims Board (L 1966, ch 894, § 1). Recognizing that many victims of crime and their dependents suffer disability, incur financial hardship or become dependent upon public assistance as a result of criminal acts, the Legislature enacted the statute to establish a mechanism whereby the State would provide victims with financial

assistance. It has since been extensively expanded to provide crime victims and witnesses with rehabilitation programs, crisis intervention and other counseling services, and to facilitate funding from other sources, both public and private (see, Executive Law § 631-a; L 1985, ch 688, § 12; L 1986, ch 263, § 6). The statute authorized respondent Board to investigate and determine claims of crime victims, to grant them emergency awards before final determination of the claims (Executive Law § 630) and grant final awards not to exceed $30,000 (§ 631). A victim is defined as a person who suffers "personal, physical, mental or emotional injury, or pecuniary loss as a result of the crime" (§§ 621[1], 632-a[10][a]) and payment to them is authorized even though the criminal is not apprehended or convicted (§ 631). The awards are free from execution or attachment by creditors, except those having claims for expenses for injuries resulting from the crime (§ 632). Upon payment, the State is subrogated, to the extent of the award, to any right of action against the criminal (§ 634). Decisions of the Board are subject to judicial review pursuant to CPLR art 78 (§ 629).

Section 632-a, the subject of this proceeding, was originally enacted in 1977 (L 1977, ch 823) and has been amended several times to narrow and clarify its scope and establish the priority of claims. The

statute provides that those contracting with "any person or the representative or assignee" of any person accused or convicted of a crime in New York, "with respect to the re-enactment of such crime" or for "the expression of such person's thoughts, feelings, opinions or emotions regarding such crime" shall submit a copy of the contract to the Crime Victims Board. If the Board determines that the criminal's work comes within the statute, any moneys owing under the contract must be paid to the Board. The funds are deposited in escrow for the benefit of the victims or legal representatives of the victims of the crime. An expanded statute of limitations is necessary because the tort statute of limitation might expire before the work is undertaken or generates income. Thus, section 632-a provides that claims may be asserted at any time within five years after the escrow is established. To be entitled to funds the claimant/victim must institute an action in a civil court, recover a judgment for damages and then apply to the Board for satisfaction of it from the escrowed funds. Upon dismissal of the criminal charges or acquittal, the Board must immediately pay over any funds in the escrow to the accused.

The statute strictly regulates the disbursement of the proceeds. They are to be used, first, to pay for the criminal's legal representation and, in the

discretion of the Board and after notice to the victims of the crime, for the necessary expenses for producing the moneys. The total amount disbursed for such purposes may not exceed 20% of the amount in the fund available to satisfy civil judgments obtained by victims of the crime. The balance of the fund is payable, in order of priority, to satisfy subrogation claims of the State (not exceeding one-half of the civil judgment obtained by the victims), the civil judgment of the victims and finally, other creditors of the criminal. The remainder, if any, is paid to the criminal at the end of five years. Moneys in the fund are not subject to execution, attachment, levy or lien except as provided in the statute and certain actions taken by the criminal to avoid the statute's provisions are declared void.

The statute was enacted in response to public outrage over the 1977 Son of Sam murders and news reports that the killer was being offered substantial sums of money for the exclusive rights to his story. The bill set up the procedures described to ensure that criminals would not profit from their crimes before the victims of those crimes had an opportunity to obtain compensation (see, Memorandum of Senator Emmanuel R. Gold, 1977 NY Legis Ann, at 267; Assembly Bill Memorandum Re: A 9019, reprinted in Legislative Bill Jacket, L 1977, ch 823).

"Stranger in Two Worlds" was written by Harris after her conviction and imprisonment in Bedford Hills Correctional Facility. During her term, she worked at the Children's Center of the prison with the children of the inmates in that facility and decided that it would be important to bring to the attention of the public the problem of imprisoned mothers trying to maintain the bonds with their children. Accordingly, she suggested that the mothers collect some of the letters written by the children and publish them. Eventually she put the collection together and enlisted the services of a book agent to help her sell the project to a publisher. The publishers were not interested in a book containing only the letters, however, and some suggested that the project would be more salable if Harris were to write her own story as well. She then expanded the book to include the story of her life, including her life with Tarnower, his murder, and her prison experiences. On March 19, 1985, MacMillan signed an agreement with Harris to publish the proposed work and paid her an advance of $50,000. She used the money for taxes and attorneys' fees connected with her criminal trial and donated the balance to charitable programs at Bedford. Subsequently, after the book was completed and published, she established Children of Bedford, Inc. and assigned all future royalties to it for the benefit of the children of women in prison. Neither she nor the

foundation have been paid any royalties for the book other than those originally advanced.

Before publication, MacMillan submitted a copy of the agreement and the book to the Crime Victims Board and on July 28, 1986, it issued a proposed order declaring the book subject to Executive Law § 632-a. At petitioners' request, an adjudicatory hearing was held after which the Board upheld its proposed order and determination and issued a final order, now under challenge, determining that the book was within the statute and requiring all moneys due under the agreement to be paid into escrow.

III

Petitioners contend first that the Board erred in determining that "Stranger in Two Worlds" was subject to the statute because the material in the book relating to the reenactment of the crime constitutes only a small portion of the book and consists primarily of reprinted transcripts of trlal testimony.

In its final determination, the Board found that the book "contains both the author's version of the reenactment of the crime of which she was convicted as well as expressions of Jean Harris' thoughts, feelings,

opinions and emotions regarding the crime." It cited specifically two chapters dealing with the Tarnower homicide and the trial, "Harrison, New York: The End of the Line" and "Westchester: The People vs. Jean Harris". The Supreme Court agreed with the Board's determination, finding that these two chapters make up the core of the work around which the narrative of Harris's life story is structured -- preceding chapters describe the forces and events leading up to the crime and following chapters tell of Harris's experiences as a consequence of her conviction for Tarnower's murder. We agree that respondents reasonably concluded the book was within the statute. Indeed, it is apparent from the preliminary negotiations between MacMillan and Harris and from the publicity surrounding the book's publication that MacMillan believed its commercial value rested on subject matter within the statute. Before accepting the book, MacMillan urged Harris to expand it to include the crime and, before publishing it, MacMillan advised the trade that Harris's soon to be released book was "a spellbinding story of her life in and out of prison," that the author kept a diary in prison "full of new facts about her relationship with Hy Tarnower, her lover for over a decade whom she ultimately murdered," and stated that "Ms. Harris comes to terms with herself [in prison] and recounts why she murdered her lover." Press reports originating from MacMillan

characterized the book as "the crime of the century -- by a woman convicted of committing it."

IV

Petitioners' further contend that the Board violated procedural due process by failing to give them proper notice of the offending passages and because the investigative and adjudicative function are improperly joined in the Crime Victims Board. The procedures established by the Board, and followed in this case, are set forth in 9 NYCRR part 526. The Board first investigates to determine if the contract at issue comes within the statute. The results of the preliminary investigation are then incorporated into a proposed determination and notice is served upon the parties to the contract. An interested party has 30 days to request a hearing to challenge the proposed finding. If a hearing is requested, the Chair assigns one or more Board members to conduct a hearing and report to the full Board on the matter. The report and written findings of the hearing officer are considered by the Board and it issues a final determination containing the findings of fact and conclusions of law which support its decision. Addressing petitioners' notice claim first, due process requires that the parties be afforded reasonable notice of the claims against them and an opportunity to be

heard on those claims (see, Mullane v Central Hanover Bank and Trust Co., 339 US 306, 313-314; Matter of Fitzgerald v Libous, 44 NY2d 660, 661). The proposed determination issued by the Board on July 29, 1986, contained a statement of the issues involved in the controversy, a detailed account of the facts which formed the basis for the Board's proposed determination, including page references to various passages in the book, and stated that the passages were found to contain "both detailed reenactment as well as expressions of Jean Harris's thoughts, feelings, opinions and emotions regarding the crime for which she was convicted." These preliminary findings were made available to petitioners prior to the administrative hearing and were sufficient to apprise them of the Board's claims.

Petitioners' remaining due process claim rests on their contention that the Board improperly acted as both prosecutor and judge by investigating the facts, issuing a proposed determination and order, holding a hearing on that determination and ultimately, upholding it. The practice of combining investigative, prosecutorial and adjudicative functions in 8 single administrative agency or board is not improper, however; statutes doing so are common (see, e.g., Alcoholic Beverage Control § 119; Civil Service Law

section 75[2]; Labor Law § 100). They do not, without more, violate due process by creating an unconstitutional risk of bias (Withrow v Larkin, 421 US 35; Matter of J. Beres & Sons Dairy, Inc. v Barber, 75 AD2d 930, 931, affd 52 NY2d 1026; see also, Buffalo Teachers' Fed., Inc. v Helsby, 35 AD2d 318, 322). The petitioners must demonstrate that because of the practice the Board has been prejudiced by its investigation or for some reason is disabled from hearing and deciding the matter on the basis of the evidence (Withrow v Larkin, supra, at 55). The record in this case contains no such evidence.

V

Having concluded the statute was properly applied to the Harris book and the proceedings before the Board were regular, we turn to petitioner's free speech claims.

A

The Board does not dispute that the book is protected speech under the First Amendment (see, Cox Broadcasting Corp. v Cohn, 420 US 469, 492 ["the commission of crime[s]...are without question events of legitimate concern to the public]; cf., Chaplinsky v New

Hampshire, 315 US 568). It contends, however, that section 632-a has only an incidental effect on speech because the restrictions imposed do not prohibit criminals from speaking about their crimes nor do they prohibit publishers from publishing the criminal's reenactment or discussion of the crimes. They merely insure that profits received by the criminal from doing so are first made available to compensate the victims of the crime -- a purpose unrelated to the suppression of free expression (see, United States v O'Brien, 391 US 367, 377).

We conclude that the statute is content-based and imposes a direct burden on speech. Harris may write, and her publisher may publish, any literary work written by her without regulation unless the subject matter of the work deals with the crime of which she stands convicted (Executive Law § 632-a[1]). Because of that exception, however, both the publisher and the Board must scrutinize the work to determine whether the subject matter being addressed falls within the terms of the statute. If it does, the statute imposes a burden on the criminal's speech by regulating the financial aspects of it (see, Meyer v Grant, 486 US 414).

In Meyer v Grant, the Court examined a Colorado statute that prohibited the payment of persons

to circulate petitions for ballot initiatives. The court concluded that the statute was subject to strict scrutiny because it imposed financial limitations which directly burdened political speech. It did so by limiting the number of voices who would convey the message expressed in the petition and making it less likely that the number of signatures necessary to place the issue on the state ballot would be obtained. Parties were free to use volunteers to circulate their petitions, but they were prohibited from paying people to do so and that restriction, the court held, limited their ability to make the issue the focus of statewide discussion (Meyer v Grant, supra, at 422-23). A similar result follows for non-political speech (see, Schaumberg v Citizens for a Better Environment, 444 US 620 [regulation of the financial aspects of charitable solicitation; Riley v National Federation of the Bind, Inc., 487 US 781; Secretary of State of Maryland v Joseph H. Munson Co., 467 US 947 [same]; Buckley v Valeo, 424 US 1 [contribution limitations under Election Campaign Act constitutional but expenditure limitations violated First Amendment]).

Executive Law § 632-a has a similar effect on speech by requiring the escrow of any profits paid to criminals for re-enactment or depiction of their crimes and regulating distribution of those profits

according to the statutory formula. Although the law does not foreclose the speaker's message, it imposes an economic disincentive or penalty for delivering it (cf. Miami Herald Publishing Co. v Tornillo, 418 US 241).

Because the statute singles out a category of speech based on subject matter and imposes special burdens on that category, respondents must demonstrate that it serves a compelling State interest and is narrowly tailored to achieve that purpose (see, Arkansas Writers' Project, Inc. v Rayland, 481 US 221, 231; Perry Educ. Ass'n v Perry Local Educators' Ass'n, 460 US 37, 45; Consolidated Edison v Public Serv. Comm'n, 447 US 530, 540; First National Bank of Boston v Bellotti, 435 US 765, 786).

B

It is the declared policy of this State that financial assistance, counseling and re-training should be made available to crime victims to rehabilitate them physically, emotionally and occupationally for the injuries they have sustained at the hands of a criminal (see, Executive Law, Article 22).1 Executive Law §

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1 As such, the statute is but another manifestation of the constitutionally imposed obligation of the State

632-a serves this compelling interest by facilitating compensation for victims directly injured by the crime and also to victims of other crimes by freeing up funds which would otherwise be used to compensate these victims under the general provisions of Article 22. A corollary to this interest in ensuring victim compensation, is the State's interest in having criminals, rather than taxpayers, bear the burden of compensating their victims whenever possible. Section 632-a furthers these interests by ensuring that in cases falling within its provisions the criminal will bear the financial burden of compensating the victim.

If the only purpose of section 632-a was to compensate victims, then petitioners' contention that the State's needs could be met by other, less burdensome means would be more persuasive. Manifestly, Article 22 and the general civil procedures address that need. However, section 632-a provides not only a method for victims to obtain compensation, it also meets other compelling governmental interests. It was enacted to preserve the victim's equitable right to assets earned by a criminal as a result of the

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and its subdivisions to aid the needy (NY Const, Art XVII, § 1).

victimization (compare Executive Law § 631 with § 632-a). If there is no victim a necessary requirement for implementation of the statute is lacking, section 632-a does not apply and the criminal may discuss the crime without restraint (e.g., compare, Halmi v New York State Crime Victims Board [Sup Ct N.Y. Co. 1986], NYLJ 6/5/86, at 12, col 3, affirmed on opn below 128 AD2d 411 [prostitution is victimless crime] and St. Martins Press, Inc. v Zweibel, [Sup Ct N.Y. Co., NYLJ 2/26/90, at 25, col 1 [securities fraud based on leaking market information] with Simon & Schuster, Inc. v Fischetti, 916 F2d 777 and this case). But if there are victims and the criminal profits from re-enactment or depiction of the crime, then the victims who have been injured by the criminal act, and the State, which has been called upon to render aid to those victims, should have the first claim to that money. They should be compensated before the criminal. Section 632-a also addresses another concern. Our laws are formulated to express not only the community's standards of right and wrong, but also its views on the nature and the gravity of the wrong. To the extent that the law manifests those standards, respect for it is maintained. To that end, our statutes impose on those convicted of crime punishment and disabilities which reflect the nature and extent of the community's denunciation of particular conduct (see, Gregg v Georgia, 428 US 153, 184, n 30; for illustrations

of disabilities see, e.g. Election Law § 5-106; Public Officers Law § 30[1][a]). Section 632-a embodies the community's belief that it is not only wrong for criminals to commit crimes and profit from them but also wrong for criminals to salt their victims' wounds by profiting from the victimization without recompense to the victims.2

Thus, the statute is a codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs (see, Caplan & Drysdale, Chartered v United States, ___ US ___, 109 S Ct 2646; Pertie v Chase Manhattan Bank, 33 NY2d 846; Riggs v Palmer, 115 NY 506, 511) and an expression of the penological concept which provides that victims expect and are entitled to "retributive satisfaction" from our criminal justice system (see, Schafer, Restitution to Victims of Crime -- An Old Correctional Aim Modernized, 50 Minn. L. Rev 243, 244; see also, Landau v Vallen, 895 F2d 888, 891

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2 The statute's purpose is to compensate crime victims not to protect their sensibilities or those of the public, by restricting offensive speech (cf. Texas v Johnson, US 109 S Ct 2533; Hustler Magazine, Inc. v Falwell, 484 US 46).

[recognizing equitable interest of victim to proceeds of crime]). The sponsor of the New York statute, expressed these interests when he stated that: "[i]t is abhorrent to one's sense of justice and decency that [a criminal]...can expect to receive large sums of money for his story once he is captured...while his victims are dead or injured.... The victim must be more important than the criminal" (Memorandum of Senator Emmanuel Gold, 1977 NY Legis Ann, p 267, supra).

These governmental interests have been recognized and implemented by similar statutes in approximately forty American jurisdictions.3

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3 The federal statute is found in 18 USC §§ 381, 382. The Senate Report supporting the federal statute, after noting the statute was patterned after New York's law, identified a similar policy supporting the federal law; the purpose is "to preclude criminals from profiting from the glorification of their misdeeds.... Any profits reaped from illegal acts are more appropriately used to provide restitution to the direct victim of the crime, or, alternatively, to victims of crime in general" (S. Rep. No. 497, reprinted in 1984 US Code Cong. & Admin. News, 3612-13).

Respondents' brief identifies the following states as having similar laws: Ala. Code § 41-9-80 to 84 (1982); Alaska Stat. § 12.61.020 (1989); Ariz. Rev. Stat. Ann. § 13-4202 (1989); Ark. Stat. Ann. § 16-90-308 (1989); Cal. Civ. Code § 2225 (West Supp. 1991); Colo. Rev. Stat. § 24-4.1-201 to 207 (1988) & Supp. 1990; Conn. Gen. Stat. Ann. § 54-218 (West 1985); Del. Code Ann. tit. 11, § 9101 to 9106 (1987); and Supp. 1990 Fla. Stat. Ann. § 944.512 (West 1985) and Supp. 1990; Ga. Code Ann. § 17-14-30 to 32 (1990); Haw. Rev. Stat. § 351-81 to 88 (Supp. 1989); Idaho Code § 19-5301 (1987); Ill. Ann. Stat. ch. 70, para. 411 (Smith-Hurd 1989); Ind. Code Ann. § 16-7-3.7-1 to 6 (Burns 1983); Iowa Code Ann. § 910.15 (Supp. 1990); Kan. Stat. Ann. § 74-7319 to 7321 (Supp. 1989); Ky. Rev. Stat. Ann. § 346.165 (Michie/Bobbs-Merrill 1983); La. Rev. Stat. Ann. § 46:1831 to 1839 (West 1982); Md. Ann. Code Art. 27, § 764 (1988); Mass. Gen. Laws Ann. ch. 258A, § 8 (West 1989); Mich. Comp. Laws Ann, § 780.768 (West Supp. 1990); Minn. Stat. Ann. § 611A.68 (West 1987 & Supp. 1991); Miss. Code Ann. § 99-38-1 to 11 (Supp. 1990); Mo. Ann. Stat. § 595.0145(14) (Vernon Supp. 1991); Mont. Code Ann. § 53-9-104(1)(d)(1989); Neb. Rev. Stat. § 81-1836 to 1842 (1987); Nev. Rev. Stat. § 217.265 (1986); N.J. Stat. Ann. § 52:4B-26-30 (West 1986); Ohio Rev. Code Ann. § 2969.01 to 2969.06

C

Although the State has identified compelling reasons for imposing restrictions on the category of speech at issue here, this does not end our inquiry. We must determine whether New York's statute is narrowly tailored to achieve these interests.

Petitioner contends the governmental purposes are adequately fulfilled by existing tort laws and provisional remedies, particularly the attachment laws. The tort laws do not satisfactorily address the need, however. They require the commencement of an action within three years, a period during which there may be no assets to satisfy a judgment and although a

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(1987); Okla. Stat. Ann. tit. 22, § 17 (1991); Or. Rev. Stat. § 147.274 (1989); Pa. Stat. Ann. tit. 71, § 180-7.18 (Purdon Supp. 1990); R.I. Gen. Laws S 12-25.1-1 to 12 (Supp. 1990); S.C. Code Ann. § 15-59-40 to 80 (Law. Co-op. Supp. 1990); S.D. Codified Laws Ann. § 23A-28A-1 (1990); Tenn. Code Ann. 29-13-201 to 208 (1990); Tex. Civ. Code Ann. Art. 8309-1 § 1 to 18 (Vernon Supp. 1990); Wash. Rev. Code Ann. § 7.68.200 to 280 (West Supp. 1990); Wis. Stat. Ann. § 949.165(2) (West Supp. 1990); Wyo. Stat. § 1-40-112(d) (1988).

judgment may remain in effect for 20 years, the victim has little incentive to seek relief if the criminal has no assets. Moreover, if the criminal does have assets, or subsequently acquires them, the victim would be required, if limited to tort remedies, to share those assets with general creditors. Nor do the existing attachment procedures solve the problem. CPLR article 62 provides that attachment is available upon commencement of an action, or immediately before it, if the debtor is either outside the State, or otherwise not amenable to service, or if he has taken steps to defraud his creditors or frustrate the enforcement of a judgment (see, CPLR § 6201). Because the remedy is pre-judgment, the debtors' rights must be secured by an undertaking (CPLR 6202[b]). These provisions address concerns wholly irrelevant to crime victims and the requirements for their use make them unsuitable to protect the needs of the crime victims now covered by Executive Law § 632-a. Even if the attachment laws were expanded to provide a remedy for crime victims, the provisions necessarily would operate much like Executive Law § 632-a if the statute was to serve the State's compelling interests by escrowing certain types of funds belonging to the criminal, extending the statute of limitations and ordering priorities.

Petitioners also contend that the statute is underinclusive because it does not reach income earned from writing generally, income earned from other crime related activities such as wages received by a convicted computer expert who obtains employment as a result of illegally "bugging" computer networks, or after-acquired property of the criminal. Their argument misses the point. The statute was never intended to reach profits received solely as a result of the criminal's notoriety. A criminal may earn income from writings on such subjects as prison life in general, as Harris has (see, Harris v Abate [Sup Ct N.Y. Co.], NYLJ 4/2/90, at 25, col 3), or may subsequently obtain profitable employment as an "expert", as petitioners' hypothetical computer expert might. That financial success is the result of their newly advertised expertise or prominence, not their illegal act. By contrast,-criminals covered by the statute had no marketable asset before the crime: they create, by illegal activity, a new product -- a story -- which becomes profitable in the retelling. Petitioners' reference to after-acquired property fails for the same reason. Monies received by a criminal from inheritance or other sources do not relate to the crime in which a victim has been injured. Manifestly, these assets are available to victims by the customary legal remedies, but they do not come within the purpose of Executive Law § 632-a

which is intended to protect the victim's equitable claim to profits earned by a criminal from speech made possible by reason of their victimization.

Finally, petitioners contend that the law is unconstitutional because it excessively inhibits other contracting parties, such as publishers, who want to publish material about the crimes. We disagree. There is nothing in the law which prohibits non-criminal authors from writing about the crime or publishers from publishing their works. They may write and publish about the crime in general or from the perspective of the perpetrator. Nor is there anything in the statute which prevents publishers from profiting in full from publishing any work about the crime. No monies are withheld from its earnings. The publisher is required only to submit a copy of the contract to the Board, and once it is finally determined that the statute applies, it must turn over moneys owed to the criminal under that contract to prevent the dissipation of the profits (Executive Law § 632-a[1]).

We conclude that section 632-a is narrowly tailored to meet the state's compelling interest in securing a victim's equitable right to be compensated from moneys earned by a criminal as a result of the victimization. It creates a unique and identifiable

resource and preserves it for the benefit of victims directly injured by a crime to compensate them for the damages sustained, gives them priority over the criminal's other creditors and extends the time within which a claim to the proceeds may be asserted by a victim. The statute regulates only the criminal's receipt of money, not the right to speak about the crime and it does not impose a forfeiture of all profits -- it merely delays payment (§ 632-a[11][e]). Indeed, the statute provides an incentive to speak about the crime by granting the criminal first priority to the funds for legal fees and production expenses (§ 632-a[8]) and directing payment of the balance remaining to the criminal after other authorized claims are satisfied. Moreover, the statute does not prohibit anyone else from telling or publishing the criminal's story. The reach of the law is limited to its purpose.

D

Petitioners further assert that the law is void for vagueness. An enactment is void for vagueness if its prohibitions are not clearly defined. "[M]eticulous specificity" is not required (see, Grayned v City of Rockford, 408 US 104, 110). As long as the law provides fair warning to those within its scope, clear standards for the enforcement of the law, and is not so uncertain in

terms as to lead to self-censorship it will be upheld (see, Grayned v City of Rockford, supra, at 108-109; see also, Ward v Rock Against Racism, 491 US 781, 109 S Ct 2746, 2755; Kovacs v Casper, 336 US 77, 79).

The terms of Executive Law § 632-a are sufficiently clear to meet this standard. Persons accused of or convicted of a crime and individuals contracting with those persons are covered by the statute (see, Executive Law § 632-a[1], 10[b]). It applies to any contract involving "the reenactment of such crime by way of a movie, book, magazine, article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings opinions or emotions regarding such crime" (§ 632-a[1]). A person complies with its requirements by submitting a copy of the contract to the Board and, once the Board determines that the contract falls within the purview of the statute, by paying over to the Board any moneys which would otherwise, by terms of such contract, be owing to the criminal or his representatives. The scope of the Board's enforcement powers are limited both by statute and regulation (see, § 632-a[1]-[12]; 9 NYCRR part 526). Thus, the statute clearly delineates the class of individuals within its scope, the events that trigger its application, and the acts

required for compliance and enforcement. Petitioners nevertheless attempt to illustrate the statute's vagueness by questioning the applicability of the statute to victimless crimes or to material which contains only a fleeting reference to the crime. They maintain that publishers do not have a clear idea from the language of the statute whether these circumstances would be covered by it. Such questions are matters for interpretation. Indeed, the courts have already resolved some of them (see, ante, p 14). The Constitution does not require that a law be drafted with such specificity that it leaves no room for interpretation nor is it void for vagueness merely because situations may exist in which it should not be applied (see, Grayned v City of Rockford, supra, at 108-110).

V

Finally, petitioners claim that the statute violates the free speech provision contained in the State Constitution. Inasmuch as we conclude the statute does not unconstitutionally abridge petitioners' federal rights, we are obliged to examine the State Constitution to determine whether it provides greater protections (see, Town of Islip v Cavialia, 73 NY2d 544, 555-556).

New York's free speech clause is embodied in Article I, Section 8. It contains language that is more expansive than its federal counterpart and we have at times interpreted it in a manner that is more protective of free expression than the First Amendment to the Federal Constitution (see, e.g., O'Neill v Oakgrove Constr., 71 NY2d 521, 528-529; Arcara v Cloud Books, Inc., 68 NY2d 553; see generally, Bellanca v New York State Auth., 54 NY2d 228, 234-235). Petitioners assert that we should do so here because where free expression is at stake, Article I, Section 8 of the New York Constitution demands a genuinely close fit between the asserted state interest burdening free speech and the restrictions imposed by law (citing, Arcara v Cloud Books, 68 NY2d 553). They maintain that Executive Law 632-a does not meet this standard because it is seriously under-inclusive and inadequately designed to address the general problem of victim compensation. As we have noted, petitioners' basic premise is erroneous. The statute is not designed to compensate all victims, only those who possess claims to the proceeds earned by the criminal as a result of their victimization. Moreover, assuming without deciding, that Article I, Section 8 does require some type of "genuinely close fit" between the statute and its purpose, this requirement is no more burdensome than requiring

that the statute be narrowly tailored to meet its objective and section 632-a satisfies this test.

In sum, we find "Stranger in Two Worlds" is a publication subject to the provisions of Executive Law 632-a, that respondent Board properly found it to be such and that the statute does not violate petitioners' rights to free speech under either the Federal or State Constitutions. Accordingly, the order of the Appellate Division should be affirmed, with costs.

* *

Order affirmed, with costs. Opinion by Judge Simons. Chief Judge Wachtler and Judges Alexander, Hancock and Bellacosa concur. Judges Kaye and Titone took no part.

Decided May 7, 1991

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 24, 1990.

Present--Hon. Theodore R. Kupferman, Justice
Presiding
David Ross
Sidney H. Asch
Betty Weinberg Ellerin, Justices.

39969

In the Matter of the Application
of CHILDREN OF BEDFORD, INC. and
MACMILLAN, INC.,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and rules Annulling the Determination Entered October 26, 1987 Declaring and Ordering that a Certain Book Entitled "Stranger in Two Worlds" Written by Jean Harris Is Subject to Executive Law Sect. 632-a,

- against -

ANGELO PETROMELIS, GENNARO A. FISCHETTI, GEORGE L. GROBE, JR., and DIANE MCGRATH, constituting the CRIME VICTIMS BOARD OF THE STATE OF NEW YORK,

Respondents-Respondents.

An Appeal Having been taken to this Court by the above-named appellants,

from an order and judgment (one paper) of the Supreme Court, New York County (Jacqueline

Silbermann, J., on an amended decision by Israel Rubin, J., dated April 12, 1989), entered on June 15, 1989,

and said appeal having been argued by Leon Friedman,

of counsel for the appellants, and by Susan L. Watson,

of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment (one paper),

so appealed from be and the same is hereby affirmed, for the reasons stated by Israel Rubin, J., without costs and without disbursements. The order of this Court entered herein on May 15, 1990 is hereby recalled and vacated.

ENTER:

FRANCIS X. GALDI

Clerk

Amended Decision, Dated April 12, 1989 [12-30]

AMENDED DECISION

SUPREME COURT OF THE STATE
OF NEW YORK
COUNTY OF NEW YORK:IAS PART 50L

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In the matter of the
Application of CHILDREN OF :
BEDFORD, INC.

:

Petitioner,

:

For a Judgment Pursuant to Index No.
Article 78 of the Civil : 29562/87
Practice Law and Rules
Annulling the Determination :
Entered October 26, 1987
Declaring and Ordering that :
a Certain Book Entitled
"Stranger in Two Worlds" :
written by Jean Harris is
Subject to Executive Law :
Sect. 632-a,

:

- against -

:

ANGELO PETROMELIS, GENNARO
A. FISCHETTI, GEORGE L. :
GROBE, JR., and DIANE
McGRATH, constituting the :
Crime Victims Board of the
State of New York, :

Respondents. :

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ISRAEL RUBIN, J.

Petitioner foundation, by way of an order to show cause, seeks a judgment annulling the determination of respondent Crime Victims Board, entered October 26, 1987, which declared that the book Stranger in Two Worlds by Jean Harris is subject to the Executive Law, Section 632-a, the so-called "Son of Sam Law." The parties have stipulated, inter alia, that the subject order shall be stayed pending final disposition of this matter, that Macmillan, Inc. shall be added as an intervening petitioner, and that Macmillan, Inc. shall segregate all sums owed to Jean Harris pursuant to a publishing agreement dated March 19, 1985 and hold them for disposition in accordance with the judgment herein.

Section 632-a of the Executive Law provides, in pertinent part:

> Every person, firm, corporation, association or other legal entity contracting with any person, . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused person's thoughts, feelings, opinions or emotions regarding such crime, shall pay over to the board any moneys which would otherwise,

> by terms of such contract, be owing to the person so convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim . . . of crimes committed by: (i) such convited person; or (ii) by such accused person but only if such accused prson is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment against such person or his representatives (Executive Law, 632-a(1)

In early 1986, respondent Crime Victims Board, upon learning about the existence of a contract dated March 19, 1985 between intervening petitioner Macmillan, Inc. ("Macmillan") and Jean Harris, commenced an investigation to determine if the contract came within the purview of the statute. By letter dated February 10, 1986, the Board requested a copy of the subject contract from Macmillan. In a reply dated February 11, 1986, the Board acknowledged that it was familiar with the statute, but stated that it had not submitted a copy of the contract to the Board because it believed, on the basis of sample material it had received, that the book to be written by Jean Harris would concern "the plight of children with mothers behind bars", as a magazine article had described it in January,

1985. The letter went on to state that, when the "raw" manuscript was received in early September, 1985, it was clear that the contents of the book "would differ substantially from what Mrs. Harris had originally submitted and that it was impossible to assess the potential applicability of the statute until the final shaping of the book had been completed."

In its final determination, dated October 26, 1987, the Board found that the contract, which provides for payment of $50,000.00 to Harris upon signing and an additional $50,000.00 upon submission of an appropriate manuscript, is subject to the statute. The Board further determined that a ten percent commission paid to Harris's agent was proper. Therefore, it ordered Jean Harris to pay over to the Board $45,000.00 (net of commission) already received and, upon her failure to pay such amount within 30 days after issuance of the order, it ordered Macmillan to pay such amount. It further ordered that any other amounts due under the contract be turned over to the Board to be held in escrow pursuant to the statute.

Petitioners contend that Section 632-a of the Executive Law violates the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution (although petitioners

advance no separate State constitutional argument). Petitioners further claim that the law does not apply to the subject work and that, in any event, the order issued by respondent Crime Victims Board is invalid for failure of the Board to comply with procedural due process requirements.

It is well settled that, while an Article 78 proceeding may be used to determine whether a legislative enactment has been applied in a manner consistent with constitutional requirements (Overhill Bldg. Co. v Delaney, 28 NY2d 449, 458 [1971]), it may not be utilized to review the constitutionality of the enactment itself, requiring that this court convert the matter into a declaratory judgment action (CPLR 103; Matter of Kovarsky v Hous. & Dev. Auth., 31 NY2d 184, 192 [1972]; see also, Matter of Ames Volkswagen v State Tax Comm., 47 NY2d 345, 348 [1979]).

It is appropriate to first take up petitioners' argument that due process has not been accorded. They contend that the Board's actions 1) in failing to identify the particular passages of the Harris book which bring it within the ambit of Section 632-a of the Executive Law and 2) in upholding the findings of one of its members that the work is subject to the statute violate principles of procedural due process.

The procedure employed by the Board in effectuating the statute is set forth in 9 NYCRR 526.1. The rule requires an investigation to be conducted to determine if the contract in question falls within the purview of Section 632-a of the Executive Law. Upon completion of the investigtion, the results are incorporated into a proposed determination, notice of which is served upon the parties to the contract, the accused or convicted party and his victims. The parties are advised that the proposed determination will become final 30 days after service, unless a written request for a hearing is received from an interested person. Following receipt of such a request, a hearing is conducted by one or more Board members assigned by the chairman to report on the matter and file written findings with the full Board. Following due consideration of the member's report, the Board issues a final determination containing the findings of fact and conclusions of law which support its decision (9 NYCRR 526.1(f)).

Due process requires only that the parties be afforded reasonable notice of the proceeding and the opportunity to be heard in objection thereto, and what is reasonable may be considered "with due regard for the practicalities and peculiarities of the case . . ." (Mullane v

Central Hanover Trust Co., 339 US 306, 314-315 [1950]). The same criteria are applicable to administrative proceedings (Alvarado v State, 110 AD2d 583 [1st Dept 1985]).

The propriety of the procedure followed by the Crime Victims Board is not seriously open to question. A board or officer may designate that a hearing be conducted by a board member or a subordinate as long as the ultimate determination is that of the board or officer empowered to make it (Matter of Simpson v Wolansky, 38 NY2d 391 [1975]). The proposed determination, issued July 28, 1986, contained a detailed statement of the issues involved in this controversy. As such, it must be considered more than adequate notice of the nature of the proceedinq (see, Matter of Photo Medic Equip. Inc. v Suffolk County Dept. of Health Svcs., 122 AD2d 882 [2d Dept. 1986]). Therefore, petitioners were
adequately apprised of the issues presented in this administrative proceeding and were heard in opposition to the agency's contentions.

The assertion that the Board failed to identify the specific passages which subject the book to the statute is of no significance. The Board alleged, generally, that material contained within pages 123 and

192 renders the book subject to the law. However, based
upon the observations which follow, this court deems it quite unnecessary that specific passages be identified as statutorily objectionable (see, Matter of Fitzgerald v Libous, 44 NY2d 660 [1978]).

Petitioners' contention that the subject work does not fall within the purview of the statute is totally uncompelling. The gravamen of petitioners' argument is that the two chapters, "Harrison, New York: The End of the Line" and "Westchester: The People vs. Jean Harris," which deal with the death of Herman Tarnower, contain only material available from the trial transcript. They maintain, in their memorandum of law, that only original material should be subject to the statute and that it should be construed "to exclude legitimate reference to evidence in the case as part of a general discussion of the trial."

It must be emphasized that the statute contains no exclusion for material which is introduced during trial and which is therefore a matter of public record. Any such interpretation would constitute a broad exception to the law, and imposition of such a significant limitation on the scope of the legislative

enactment by this court would be an unwarranted exercise of judicial construction.

Petitioners' attempt to characterize the two chapters dealing with Tarnower's death as a relatively minor portion of the book misrepresents their significance to the autobiography as a whole. Those chapters make up the core of the work, around which the narrative is structured. Preceding chapters describe the forces and events leading up to the crime; Harris's introduction to Tarnower ("New York: The Fateful Year"), their relationship ("Brooklyn: Hy") and the pressures which confronted Harris, causing her to become depressed and comtemplate suicide ("Virginia: Headmistress"). Following chapters tell of Harris's experiences as a consequence of her conviction for Tarnower's murder; her incarceration in the correctional facility at Bedford Hills and her observations about life in that institution and about the people she has encountered there. It is not unfair to say that the entire book is centered around Tarnower's death, and at least half the work is comprised of the story of the crime.

Petitioner's attempt to exempt the book from the operation of the statute on the ground that Jean Harris

will derive no economic benefit from its publicatlon is likewise unavailing. The statute expressly applies to assignees of any person convicted of a crime (Executive Law, Section 632-a(1)). If this provision is not definite enough, the law further provides, "Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state" (Executive Law, Section 632-a(9)). The legislative interest is clearly to afford a source of funds out of which civil judgments obtained by victims of a crime may be satisfied. While the creation of a trust to benefit disadvantaged children whose mothers have been incarcarated at the Bedford Hills Correctional Facility represents a laudable undertaking, the funding of that trust with moneys derived from the sale of a book about a crime is contrary to statutory intent and adverse to the interests of the crime victim. "Victim", for statutory purposes, includes anyone who suffers a pecuniary loss as a direct result of the crime (Executive Law, Section 632-a(1O)(a)), a definition which encompasses the legal representative of an estate on a claim for wrongful death (see Section 632-a(7)).

Having concluded that petitioners were accorded due process and that the contract for the right to publish the book entitled Stranger in Two Worlds falls within the ambit of Section 632-a of the Executive Law, it is appropriate to examine petitioners' First Amendment arguments. Before proceeding further, however, it is enlightening to examine the statute, not in terms of what expressive activities it restricts, but in view of those activities it does not restrict.

Most significantly, the statute does not prohibit a person convicted or accused of a crime from engaging in conduct designed to communicate the details of the crime or his thoughts and feelings about its commission or about the resulting prosecution and trial. Nor does the law prohibit any segment of the press from functioning as the instrument for the communication of such information to the public or from reaping a financial benefit from performance of that function. The statute affects only the rights of the perpetrator to receive any profit from communications concerning the crime unless and until all proceeds have been held in escrow for five years and made available to satisfy any civil judgment obtained against the wrongdoer. To assist the victim in seeking compensation for any loss, the statute provides that civil actions may be commenced within five years after the escrow account is established,

irrespective of the Statute of Limitations normally applicable to the particular cause of action (Executive Law §632-a(7); Barrett v Wojtowicz, 66 AD2d 604 [2d Dept 1979]). What the law regulates, therefore, is not speech but disposition of property (viz. royalties) derived from specified expressive activity by a particular type of speaker. The issue is therefore whether First Amendment protection encompasses the unfettered right of a criminal-author to receive immediate payment for communication about the crime and, if so, whether the victim's right to compensation and the State's interest in preventing the criminal from profiting from the offense justifies the abridgement of expression which application of the statute entails.

Petitioners have cited no authority for the proposition that the First Amendment protects not only the right to expression but also the right to payment for the exercise of that right. They rely on Arkansas Writers Project v Ragland (107 S Ct 1722 [1987]), Minneapolis Star & Tribune Co. v Minnesota Commissioner of Revenue (460 US 575 [1983]) and Legi-Tech v Keiper (766 F2d 728 [2d Cir. 1985]), all of which deal with financial burdens imposed solely upon the press or upon functions in which the press engages. Because the legislation under examination places no burden on the

press, which is free to report about the crime from the perspective of the perpetrator without restriction on any profit which might be derived, these cases are entirely inapposite.

The statute provides a means to attach funds due to a tortfeasor in order to satisfy potential judgments which may be obtained by injured parties. Under the theory advanced by petitioners, it would be constitutionally suspect to garnishee the salary of a writer for failure to make child support payments because the income is derived from protected expressive activity. In the matter before this court, the mere fact that the subject of the writing embraced by the statute is the incident out of which the suit for damges arises does not elevate the expressive activity to a special protected status. Nor does it render the attachment and escrow of funds payable to the author a differential burden imposed upon protected expressive activity. Therefore, those cases cited by petitioners dealing with regulation of the discussion of particular topics and the expression of particular points of view (e.g., First Natl. Bank v Belotti, 435 US 765 [1979]; FCC v. League of Women Voters, 468 US 364 [1984]; Consolidated Edison Co. v Pub. Serv. Commn., 447 US 530, 537 [1980]) have no bearing on the issue before the court.

It is apparent that petitioner Macmillan is concerned about the potential inhibiting effect of the statute on the willingness of criminal-authors to write about their crimes, thus eliminating a source of profit for the publisher as well as the author. This concern is clearly without foundation in the instant proceeding as the author has no interest in receiving the profit from the book, having assigned the proceeds to a foundation (albeit one having Mrs. Harris's son David, who is also a director, as its president and another son, James, as a second director). Moreover, petitioners have asserted that the facts surrounding Tarnower's death are available in the trial transcript, which means that a book about the crime could have been written from information available as a matter of public record, supplemented by material obtained from interviews with persons acquaintanced with Mrs. Harris. Indeed, her affidavit states that ". . . other people have used the transcript of the trial to derive profit from reenacting my life without my knowledge, permission or benefit." It does not follow that the statute will necessarily prevent either the dissemination of information of interest to the public or the generation of income earned from publication of materials concerning the crime.

Even if it is assumed, arguendo, that the statute will have some inhibiting effect on the free

exchange of information, any such impact results not from curtailment of the expression of a particular idea or viewpoint (e.g., New York Times v Sullivan, 376 US 254, 276 [1964]) but from compliance with a scheme for attachment which may have the effect of discouraging the flow of information (e.g., Buckley v Valeo, 424 US 1, 19-22 [1976]; see also, Tribe, Constitutional Law §12-2, at 789-790 [2d ed]). Thus, a First Amendment analysis requires a balancing of the governmental interest sought to be advanced against any encroachment of First Amendment guarantees which may indirectly result. If the free exchange of ideas is not unduly restricted, the enactment will pass constitutional muster (Cox v New Hampshire, 312 US 569, 574 [1941]). The State's interests in providinq a source of funds to compensate victims of a crime who might otherwise have no source of redress and in barring a given perpetrator from reaping a potential windfall from the publicity generated by a particularly controversial or infamous crime significantly outweigh the minimal impact on the dissemination of information (United States v O'Brien, 391 US 367, 377 [1968]).

While the Constitution has provided protection to the rights of the accused for two centuries, legislation designed to further the rights of crime victims is a relatively recent and commendable innovation. The

platitude that, by virtue of a period of incarceration, a criminal has "paid his debt to society" may be small comfort to a family devastated by the death or disability of its breadwinner at the hands of an attacker. Petitioners' objection that the statute concentrates only on income derived from communication about the crime has some merit insofar as it indicates that the law may not go far enough in subjecting future income of the perpetrator to the claims of the victim although, as a practical matter, most criminals will possess no other source of income. However, as the concept of victims' rights develops, both legislation and case law will contribute to its refinement. For the moment, it need only be observed that the subordination of the criminal's right to receive compensation for literary efforts regarding the crime to the victim's right to receive compensation for damages sustained as a result of its commission is neither repugnant to constitutional standards nor to the court's concepts of equity and fairness. Therefore, this court concludes that, to the extent it might be said to inhibit First Amendment activity, the statute places no burden thereon which is not narrowly tailored to a compelling State interest (First Natl. Bank v Belotti, supra, 435 US 765, 786 [1978]).

Petitioners' last constitutional objection is based upon the statute's asserted vagueness and overbreadth. It is clear that a statute which is "so vague, indefinite and uncertain" that its meaning cannot be discerned offends the due process guarantee under the Fourteenth Amendment (Lanzetta v New Jersey, 306 US 451, 458 [1939]). However, as the preceding analysis reveals, this court cannot agree with petitioners' assertion that the law is drafted with such imprecision that a person of normal intelligence is not apprised as to what it prohibits so that he may comport himself accordingly (Grayned v City of Rochford, 408 US 104, 108 [1972]), or that respondent does not have reasonably clear guidelines so as to preclude discriminatory or capricious enforcement (Smith v Goguen, 415 US 566, 573 [974]). The statutory purpose is clear (compensation of the victim), it is triggered by a well-defined event (commission of a crime) and it applies to a limited class of individuals (criminal-authors). That instances may be envisioned where a work should not be made subject to the provisions of the statute, such as where the crime is a minor offense or was committed by a youthful offender or in the remote past, does not render it constitutionally vague (e.g., Cox v Louisiana, 379 US 559 [1965], prohibition against picketing "near" a courthouse held to be both precise and narrowly drafted). Petitioners may

be assured "that the New York courts will apply the statute consistently with the constitutional command" (Time, Inc. v Hill, 385 US 374, 397 [1967]) and so avoid unwarranted infringement of First Amendment prerogatives.

Similarly, the mere possibility that a statute might be applied to some protected expressive activity does not compel the court to declare the staeute void (New York v Ferber, 458 US 747, 768 [1982]). Development of the law is best served by the adjudication of the dispute actually before the court, thus precluding speculation concerning the statute's effect on protected expression in some hypothetical context (Younger v Harris, 401 US 37, 52 [1971]; Brockett v Spokane Arcades, 472 US 491, 501-502 [1985]). Upon this review of the law, this court will not "assume that the New York courts will widen the possibly invalid reach of the statute" (New York v Ferber, supra, at 773) and thus obviate the opportunity for our courts to construe Section 632-a of the Executive Law in a manner consistent with First Amendment protections.

The proceeding at bar does not demonstrate that any inhibition of protected expression has occurred. The statute does not bar publication of

any manuscript which a publisher might receive or prevent a criminal-author from telling about the crime. Furthermore, a publisher may shield itself from any potential liability by the simple expedient of holding any funds due to the author in escrow and making payment subject to any determination of respondent Crime Victims Board.

Petitioner Macmillan nevertheless argues that, at the time its contract with Mrs. Harris was signed, it was under the impression that the book would be about prison reform (affidavit of Jan F. Constaneine, p 5). While it is alleged that this impression was conveyed by a one-hundred-page outline it had received from the author, a copy of this material has not been submitted upon this application. The provisional title of the work stated in the contract, signed on March 19, 1985, is 'JEAN HARRIS: Autobiographical Reflections." It is apparent to everyone, except Macmillan, that any autobiography of Jean Harris would make prominent mention of the Tarnower matter. An autobiography of Jean Harris which fails to mention the most profound event in her life is no more tenable than an autobiography of Ronald Reagan which omits any mention of his presidency. However, even taking Macmillan's assertions at face value, a publisher is not without editorial control over a manuscript. Had

Macmillan been willing to forego the publicity attendant upon publication of Mrs. Harris's own version of the death of Herman Tarnower, it could have deleted all reference to the event from the final version of the book. However, from the press releases of early 1986, it is clear that Macmillan used the publicity value of the murder to the fullest, heralding the forthcoming book as "the crime of the century - - by a woman convicted of committing it." It could only be naivete on Macmillan's part which would have caused it to overlook, from the inception, the intense public interest in Jean Harris, an interest which arose solely from the involvement in Herman Tarnower's untimely demise. Macmillan's intimation that, at the time the agreement with Mrs. Harris was signed, it never occurred to it that the book would include references to the crime, is simply not credible. But even if that is, in fact, what transpired, the statute is not rendered constitutionally infirm merely because an entity subject to its provisions fails to anticipate its application.

Accordingly, the petition is denied. This court declares that Section 632-a of the Executive Law is applicable to the contract between Macmillan and Harris, that the determination of respondent Crime Victims Board is not arbitray and capricious, and that the statute does not violate the First and Fourteenth

Amendments of the United States Constitution and Article I, Section 8 of the New York State Constitution.

Settle order.

_____
J.S.C.

DATED: April 12, 1989

Judgment/Order, Dated June 15, 1989
[7-11]

At an IAS Part 50D of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse located at 60 Centre Street, New York on the 31st day of May, 1981.

P R E S E N T: Jacqueline Silbermann

H O N.: ISRAEL RUBIN, Justice

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In the Matter of the :
Application of CHILDREN
OF BEDFORD, INC. and :
MACMILLAN, INC.,

:JUDGMENT/ORD
ER

Petitioner, : Index No.
: 29562/87

For a Judgment Pursuant
to Article 78 of the :
Civil Practice Law and
Rules Annulling the :
Determination Entered
October 26, 1967 :
Declaring and Ordering
that a Certain book :
Entitled "Stranger in two
Worlds" written by Jean :
Harris is subject to
Executive Law Section :
832-a,

:

- against -

:

ANGELO PETROMELIS,
GENNARO A. FISCHETTI, :

GEORGE L. GROBE, JR., and DIANE McGRATH, constituting the Crime Victims Board of the State of New York,

Respondents.

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Petitioner, CHILDREN OF BEDFORD INC. having commenced this proceeding by Order To Show Cause dated November 30, 1987 with an accompanying petition sworn to by Elanore Kennedy on November 25, 1987, affirmation of Leon Friedman dated November 30, 1987, and Exhibits A through E, and seeking therein an order pursuant to Section 7801 of the Civil Practice Law and Rules ("CPLR") annulling respondents' decision and order of October 26, 1987, declaring that Jean Harris' book "Stranger in Two Worlds" is subject to Executive Law Section 632-a and ordering Jean Harris and Macmillan, Inc. to pay over to the Crime Victims Board all advances, monies and royalties earned by the author under the publishing contract between those parties and for a stay of the decision and order of the Board pending this Court's determination on the merits, and

Petitioner and respondents having agreed, by stipulation dated December 21, 1987, that Macmillan, Inc. may intervene in this proceeding as an intervening petitioner, that the petition shall be deemed amended to add Macmillan, Inc. in the caption as such an intervening petitioner, that Macmillan, Inc. agrees to segregate all moneys due and owing to Jean Harris pursuant to the publishing agreement dated March 18, 1985 and to pay said amounts to the Crime Victims Board pursuant to order of this Court and/or any appellate courts on final disposition of this matter, that Macmillan, Inc. shall voluntarily hand over to counsel for respondents all later contracts between it and Jean Harris and that the order of October 26, 1987 is stayed until final disposition of this matter, and

The Estate of Herman Tarnower, by Notice of Motion dated February 29, 1988, with accompanying affidavit of Peter M. Nisselson, sworn to February 26, 1988 and affirmation of Roger H. Sirlin, dated February 21, 1988, having sought an order, pursuant to CPLR § 1012(a)(3), to intervene as a respondent in this proceeding on the ground, inter alia, that this proceeding involves the disposition and distribution of future escrow funds established pursuant to Executive Law, Section 632-a, and

Petitioner, Children of Bedford, Inc., having opposed the application to intervene by affirmation of Leon Friedman, dated March 17, 1988, and

This Court, having issued an opinion dated April 29, 1988, and published in the NYLJ, May 6, 1988, p. 14, col. 3, permitting the Estate of Herman Tarnower to intervene as a respondent in this proceeding pursuant to CPLR § 7802(d), and

Petitioners, having supplemented their original Order to Show Cause papers with the affidavit of Jean Harris, sworn to April 26, 1988, the affirmation of Jan Constantine, dated May 13, 1988, and, from the pending federal court action, Simon & Schuster, Inc. v. Members of the Crime Victims Board, 87 Civ. 5582 (SD) (JFK), the affidavits of Gerald A. Hollingsworth, sworn to December 11, 1987, Jan F. Constantine, sworn to December 11, 1987 and Phyllis E. Grann, sworn to December 15, 1987 and the Declaration of Jason McManus, sworn to December 11, 1987 and having renumbered their exhibits from the Order to Show Cause as Exhibits 1-12 respectively, and

Respondents, having answered the petition by Verified Answer sworn to on October 28,

1988, with Exhibits A through E annexed thereto, the affidavit of Lorraine Felegy, sworn to October 27, 1988 with Exhibits _ through Q annexed thereto, and, having responded that the petition fails to state a claim upon which relief can be granted, that the Crime Victim Board's Final Determination and Order of October 26, 1987, was neither arbitrary nor capricious, and that Section 632-a of the Executive Law does not violate the First or Fourteenth Amendments to the United States Constitution or Article I, Section 8 of the New York State Constitution or Article I, Section 8 of the New York State Constitution, and

The proceeding having been submitted to the Court, and upon reading and filing all of the foregoing papers, and due deliberation having been had, and the Court having issued its opinion dated April 12, 1989,

NOW, on motion of ROBERT ABRAMS, Attorney General of the State of New York, by Howard L. Zwickel and Anne S. Haskell, Assistant Attorneys General, attorney for the respondents, it is

ORDERED, that the proceeding is converted into a declaratory judgment action, and it is further

ADJUDGED AND DECLARED that the petition is denied and that Section 632-a of the Executive Law is applicable to the contract between Macmillan and Harris, that the final determination of respondent Crime Victims Board dated October 26, 1987, is not arbitrary and capricious, and that Section 632-a of the Executive Law does not violate the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the New York State Constitution.

ENTER

_____

J.S.C.

Norman Goodman
Clerk

F I L E D

JUN 15 1989

COUNTY CLERK'S OFFICE
NEW YORK

[NEW YORK EXECUTIVE LAW]

§ 632-a. Distribution of moneys received as a result of the commission of crime

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account,

brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.

2. The board, at least once every six months for five years from the date it receives such moneys, shall cause to have published a legal notice in newspapers of general circulation in the county wherein the crime was committed and in counties contiguous to such county advising such victims that such escrow moneys are available to satisfy money judgments pursuant to this section. For crimes committed in a county located within a city having a population of one million or more, the notice provided for in this section shall be in newspapers having general circulation in such city. The board may, in its discretion, provide for such additional notice as it deems necessary.

3. Upon dismissal charges or acquittal of any accused person the board shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.

4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that

no actions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.

5. For purposes of this section, a person found not guilty as a result of the defense of mental disease or defect pursuant to section 30.05 of the penal law shall be deemed to be a convicted person.

6. Whenever it is found, pursuant to article seven hundred thirty of the criminal procedure law, that a person accused of a crime is unfit to proceed as a result of mental disease or defect because such person lacks capacity to understand the proceedings against him or to assist in his own defense, the board shall bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules to determine disposition of the escrow account.

7. Nothwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, the five year period provided for in subdivision one of this section shall not begin to run until and escrow account has been established.

8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to any person accused or convicted of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process. The board may in its discretion and after notice to the victims of the crime make payments from the escrow account to a representative of any person accused or convicted of a crime for the necessary expenses of the production of the moneys paid into the escrow account, provided the board finds that such payments would be in the best interests of the victims of the crime and would not be contrary to public policy. The total of all payments made from the escrow account under this subdivision shall not exceed one-fifth of the total moneys paid into the escrow account and available to satisfy civil judgments obtained by the victims of the crime.

9. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this

section shall be null and void as against the public policy of this state.

10. For purposes of this section:

(a) Victim shall mean a person who suffers personal, physical, mental, or emotional injury, or pecuniary loss as a direct result of the crime.

(b) A person convicted of a crime shall include any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.

11. Nothwithstanding any other provision of law, claims on moneys in the escrow account shall have the following priorities:

(a) Payments ordered by the board or a court pursuant to subdivision eight of the section;

(b) Subrogation claims of the state pursuant to section six hundred thirty-four of this article in an amount not exceeding one-half of the net amount

of the civil judgment obtained by a victim which is payable directly to the victim from the escrow account;

(c) Civil judgments of the victims of the crime;

(d) Other judgment creditors or persons claiming moneys thought the person accused or convicted of a crime who present lawful claims, including state or local government tax authorities;

(e) The person accused or convicted of the crime.

No payment shall be made out of the escrow account where such payment would be in derogation of claims, either presented or pending, entitled to a higher priority under this subdivision. The board may bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules or an action for a declaratory judgment where it cannot determine the priority of claims and the proper disposition of the escrow account.

Moneys in the escrow account shall not be subject to execution, levy, attachment or lien except in

accordance with the priority of claims established in this subdivision.

12. Notwithstanding any other provisions of law, the board shall have exclusive jurisdiction and control, as escrow agent, over any moneys subject to this section. No distribution of moneys in such escrow accounts shall be made except by determination and order of the board, pursuant to the provisions of this section and the board's rules and regulations. Any party aggrieved by a final determination and order of the board under this section may seek judicial review of such decision pursuant to article seventy-eight of the civil practice law and rules.

Supreme Court, U.S.
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No. 91-206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHILDREN OF BEDFORD, INC. and MACMILLAN, INC.,

Petitioners,

—against—

ANGELO PETROMELIS, GENNARO A. FISCHETTI, GEORGE L. GROBE, JR., and DIANE MCGRATH, Constituting the CRIME VICTIMS BOARD OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does New York Executive Law § 632-a violate the First Amendment to the U.S. Constitution because it requires any person or entity that contracts to pay a criminal for discussion or re-enactment of her crime to give all money owed the criminal to the New York State Crime Victims Board for the benefit of the victims of that crime?

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INTRODUCTION

This is an appeal by petitioners, a charitable foundation created to receive the profits from the book *Stranger In Two Worlds* and the publisher of that book, from a judgment of the New York Court of Appeals (1a-29a)[1] which affirmed the judgments of the Supreme Court of the State of New York (32a-58a) and the Appellate Division of the Supreme Court. (30a-31a) The New York Court of Appeals declared that

1 ("__a") refers to the Appendix to the Petition for a Writ of Certiorari.

Executive Law ("Exec. Law") § 632-a, which requires any person or entity to turn over profits owed to a criminal who tells the story of her crime so that victims of that crime may recover for their injuries, is constitutional under the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 8 of the New York Constitution. This Court will address the First Amendment challenge to Exec. Law § 632-a in the case *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, No. 90-1059, *cert. granted*, 111 S. Ct. 950 (February 19, 1991).

Statement of the Case

I. Executive Law, § 632-a

A. The Statute

In 1977, New York enacted a statute, Exec. Law § 632-a,[2] entitled "Distribution of moneys received as a result of the commission of crime," which applies the equitable principle that no person shall be permitted to profit by her own wrongdoing to criminals who profit from selling the story of their crime. A complete discussion of Exec. Law § 632-a's provisions is contained in the Brief for Respondents submitted in *Simon & Schuster*, dated May 29, 1991, at pp. 1-7.

Exec. Law § 632-a(1) requires that any person or entity that contracts with a criminal regarding the reenactment or discussion of a crime committed by the criminal turn over to the New York State Crime Victims Board (the "Board"), an executive agency charged with enforcing the statute, a copy of the contract and the money owing to the criminal under the contract. The Board then holds the money in an escrow account for five years, and, during that time, the crime victim or the crime victim's estate can bring a civil lawsuit against the criminal, and is not subject to the regular statute

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2 The statute is reproduced in the Appendix to the Petition for A Writ of Certiorari at pages 59a-65a.

of limitations for a tort or wrongful death action.[3] Exec. Law § 632-a(7).

The money in the escrow account goes to satisfy the judgments obtained by victims of the crime. Exec. Law § 632-a(2). The statute prohibits criminals from transferring their legal interest in the profits to other entities. Executive Law § 632-a(9) prohibits any action taken by a criminal "by way of execution of a power of attorney, creation of corporate entities or otherwise" that defeats the purpose of the statute.

The money in the escrow account is distributed in accordance with priorities set forth in the statute to ensure that the victims are paid before the criminal as well as before other judgment creditors, except that a percentage of the account is available to the criminal to pay legal fees in her criminal case and to a representative who assisted the criminal in producing the criminal's speech. Exec. Law §§ 632-a(8), (11).[4]

New York's statute attempts to redress the unfairness of criminals profiting from their crime story before their victims are compensated for their injury and suffering. Without the special procedural protections in New York's statute, a criminal could be paid a large sum of money for selling the story of her crime while her victims would be left without any meaningful remedy to recover for their injury and suffering. While the statute attaches the criminal's profits for the sake of victims, as the publication of *Stranger In Two Worlds* demonstrates, it does not prohibit a criminal from speaking about her crime nor does it prohibit a publisher from publishing the criminal's reenactment or discussion of the crime. Moreover, the statute does not require a publisher to forfeit his profits or to edit discussion of a crime from a book.

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3 *See*, New York Civil Practice Law and Rules §§ 214(5), 215(3) and 215(8) (McKinney Supp. 1990); New York Estates, Powers & Trust Law § 5-4.1 (McKinney 1981 & Supp. 1991).

4 The State is also reimbursed for any money it paid the victims under Exec. Law, Article 22, New York's general victim compensation scheme, but not to exceed one-half of the victim's judgment. Exec. Law § 632-a(11)(b).

B. Legislative History

For a complete exposition of Exec. Law § 632-a's legislative history respondents respectfully refer the Court to the Brief for Respondents submitted in *Simon & Schuster* at pp. 8-10.

II. Executive Law § 632-a And Stranger In Two Worlds

In 1981, Jean Harris, headmistress of an exclusive high school in Virginia, was convicted of Second Degree Murder in connection with the death of Herman Tarnower, M.D., her lover of ten years, at his home in Westchester County. (A. 246)[5] She is serving a term of fifteen years to life at Bedford Hills Correctional Facility ("Bedford") in New York for that crime. *Id.*

In January, 1985, petitioner Macmillan, Inc. ("Macmillan"), a book publisher, and Ms. Harris's literary agent, the Lantz Office, undertook negotiations for the publication of a manuscript by Ms. Harris. (A. 284) On March 19, 1985, Ms. Harris entered into a contract (the "Contract") with Macmillan for a book provisionally entitled, *JEAN HARRIS: Autobiographical Reflections*. (A. 82-88) The Contract memorialized an agreement between Ms. Harris and Macmillan under which Macmillan was given the exclusive rights to an autobiographical work by Ms. Harris. Under the terms of the Contract, Ms. Harris was to receive a $50,000 installment upon signing the Contract and another $50,000 upon delivery of the manuscript to Macmillan. (A. 82) In addition, the Contract provided for royalties to be paid to Ms. Harris based upon the number of copies of the book sold. *Id.* The money for the first installment was paid to Ms. Harris through the Lantz Office, which retained $5,000 as its commission. Jean Harris used approximately $20,000 of the first $50,000 paid to her by MacMillan for her book *Stranger in Two Worlds* to pay her outstanding legal fees. In July, 1985, Macmillan advised the trade that Jean Harris's book was "full of new

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5 ("A. ___") refers to the Appendix in the New York Court of Appeals.

facts about her relationship with Hy Tarnower, her lover for over a decade whom she ultimately murdered" and that Ms. Harris "comes to terms with herself and recounts why she murdered her lover." (A. 63)

In late 1985, Ms. Harris delivered a manuscript entitled *Stranger In Two Worlds* to Macmillan. (A. 35) It was published under that title in May, 1986. *Id.* The book is divided into two parts. Part I describes Ms. Harris's early life, her relationship with Dr. Tarnower, his death and her subsequent trial and conviction for his murder. Part II describes Ms. Harris's life and work at Bedford. (A. 35-36) Two chapters in Part I are devoted to the discussion of the crime and the trial; they are chapters 9 and 10 entitled, "Harrison, New York: The End of the Line," (pages 124-149); and "Westchester: The People of New York vs. Jean Harris" (Pages 150-192), respectively. Ms. Harris concedes that she described her crime and her thoughts, feelings, opinions and emotions about it by selective use of the trial transcripts. (A. 277)

In April, 1986, petitioner, Children of Bedford, Inc. (the "foundation"), a not-for-profit corporation, was established at Ms. Harris's direction. (A. 107, 278) She then assigned all her royalties under the Contract to the foundation in order to benefit children whose mothers were incarcerated in Bedford. *Id.* By her own admission, Ms. Harris's purpose in establishing the foundation was to protect income derived from the book from Section 632-a. (A. 278)

III. The Administrative Proceedings

The Board first learned of the Contract in February, 1986, when Macmillan issued publicity releases trumpeting the arrival of a book by Jean Harris about "the crime of the century—by a woman convicted of committing it." (A. 89, 247-48) The Board immediately began an investigation to determine if the Contract came within the purview of Section 632-a. (A. 248-50)

After completing its investigation, the Board issued a Proposed Determination and Order ("Proposed Order"), dated

July 29, 1986, finding that *Stranger In Two Worlds* contains Ms. Harris's version of a reenactment of the crime for which she was convicted, as well as her thoughts, feelings, opinions and emotions regarding the crime. The Board's proposed determination identified two chapters of the book, pages 123 through 192, that involved "detailed reenactment of the crime, as well as numerous expressions of Ms. Harris's thoughts, feelings and emotions about the crime." (A. 77) The Proposed Order concluded that the Contract and the book published thereunder fell within the purview of Section 632-a, that any assignment, such as that made by Ms. Harris to the foundation, was void pursuant to Exec. Law § 632-a(9), and that all money paid to or due to Ms. Harris under the Contract should be turned over to the Board to be held in escrow for the victims of the crime committed by Ms. Harris. (A. 75-80) The foundation, Macmillan and the Lantz office filed timely objections to the Proposed Order. (A. 270-73) Hearings were held before a Board member and on October 26, 1987, the Board issued its Final Determination and Order ("Final Order") which adopted the Proposed Order. (A 59)

IV. The Proceedings and Decisions of the New York Supreme Court

The foundation commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules, dated November 30, 1987, in the Supreme Court, New York County. (A. 31) In its petition, the foundation sought to annul the Board's determination that *Stranger in Two Worlds* was subject to Exec. Law § 632-a and asserted that the law was not meant to cover assignments by a criminal-author to a legitimate charity. (A. 38) The foundation also alleged that the statute was invalid under the First Amendment to the U.S. Constitution and under Article I, Section 8 of the New York Constitution. (A. 37-38)[6] Macmillan intervened in the

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6 The foundation also claimed that the administrative proceedings in this case violated the Due Process Clause of Fourteenth Amendment of the U.S. Constitution because the Board gave inadequate notice

proceeding as a petitioner. (A. 143) Petitioners submitted to the New York court the affidavits from the *Simon & Schuster* case now before this Court.

In a decision dated April 12, 1989, the New York Supreme Court rejected all of petitioners' claims. *Children of Bedford, Inc. v. Petromelis*, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989) (42a). In addressing petitioners' contention that Exec. Law § 632-a violates the First Amendment, the court reasoned that the statute was not directed at the criminal's ability to speak, but only at his or her ability to profit from speech about the crime. The court noted that it neither prohibits a person from communicating the details of a crime or his thoughts or feelings about the crime nor prevents the press from functioning (and profiting) as an instrument for the communication of such information. (42a)

The court then stated that even if the statute might have some inhibiting effect on expression, it survives scrutiny under the balancing test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The court found the State's interest in providing a source of funds to compensate victims of publicized crimes significantly outweighed "the minimal impact on the dissemination of information." (46a) The court also found that any burden that the statute might have on First Amendment activity was the result of a narrowly tailored statute serving a compelling state interest. (47a)

The Supreme Court entered a judgment denying the petition and declaring Exec. Law § 632-a to be constitutional under the First and Fourteenth Amendments to the United States Constitution and under Article I, Section 8 of the New

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of which parts of the book were covered by the statute and the Board combined prosecutorial and adjudicatory functions in its administrative determination. (A. 38) These claims have been rejected by the New York Court of Appeals. *See* 10a-12a. Petitioners have not sought review by this Court of the issues concerning due process, the validity of the assignment to the foundation, or whether the statute applies to Ms. Harris's use of trial transcripts to discuss her crime, and therefore these issues will not be discussed further.

York Constitution. (53a-58a) The Appellate Division, First Department, unanimously affirmed the Supreme Court's judgment for the reasons set forth in the Supreme Court's decision. 161 A.D.2d 503, 556 N.Y.S.2d 483 (1st Dep't 1990) (30a-31a)

V. The New York Court Of Appeals Decision

In an opinion dated May 7, 1991, the New York Court of Appeals unanimously affirmed the Supreme Court's judgment but on different grounds than those set forth in the Supreme Court's opinion. The Court of Appeals concluded that Section 632-a directly burdens speech because "it singles out a category of speech based on subject matter and imposes special burdens on that category." (3a) The court also found that "the statute imposes a burden on the criminal's speech by regulating the financial aspect of it." (13a) Accordingly, the court stated that in order to uphold the statute, the State must demonstrate that the statute "serves a compelling state interest and is narrowly tailored to achieve that purpose (*see, Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 231 [1987])." (15a)

The court determined that the State had met its burden. The court found that Exec. Law § 632-a preserves "the victim's equitable right to assets earned by a criminal as a result of the victimization." (16a-17a) The court recognized the statute as a "codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs and an expression of the penological concept which provides that victims expect and are entitled to "retributive satisfaction from our criminal justice system." (18a) (citations omitted).

The court further determined that Exec. Law § 632-a is narrowly tailored "to meet the state's compelling interest in securing a victim's equitable right to be compensated from moneys earned by a criminal as a result of the victimization" because the statute "creates a unique and identifiable resource and preserves it for the benefit of victims," gives the

victim priority over other creditors, and extends the time within which a victim may bring an action against the criminal. (25a) The court noted that the statute does not regulate the right to speak about crime but only the criminal's receipt of money, and does not prohibit the publishing of the criminal's story. (25a)

THE PETITION SHOULD BE DEFERRED AND THEN DECIDED IN ACCORDANCE WITH THIS COURT'S DECISION IN *SIMON & SCHUSTER*

Consideration of this petition should be deferred pending this Court's decision in the *Simon & Schuster* case. Deferment is appropriate because the issue presented by petitioners in *Children of Bedford* is squarely addressed in the *Simon & Schuster* case, which is already scheduled for argument. Petitioners, citing *Keney v. New York*, 388 U.S. 440 (1967), also suggest, as an alternative to granting review in this case, that the Court should postpone consideration of the petition until the resolution of the *Simon & Schuster* case. Petition at p. 8.

In *Simon & Schuster*, the petitioner challenges the facial validity of Section 632-a, as well as its application to Simon & Schuster's payments to Henry Hill for *Wiseguy*. Petitioners in this case also challenge the statute on its face and as applied to Ms. Harris's profits from *Stranger In Two Worlds*. The issue of the facial validity of the statute has been fully briefed in *Simon & Schuster* and the petition does not raise any new or significant issues that are not presently before this Court in *Simon & Schuster*.[7] A comparison of the courts' reasoning in *Simon & Schuster* and *Children of Bedford* reveals the similarity of the two holdings. For example, the majority in *Simon & Schuster* found that New York has a compelling interest "in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of

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7 Petitioners have abandoned their Fourteenth Amendment claims raised below and, therefore, this case can be disposed of in accordance with any decision reached in *Simon & Schuster*.

their victimization." *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 782 (2d Cir. 1990). The New York Court of Appeals held that Section 632-a serves the compelling interest of preserving "the victim's equitable right to assets earned by a criminal as a result of the victimization," (16a-17a), and preventing criminals from "salt[ing] their victims' wounds by profiting from the victimization without recompense for the victims." (18a).

With regard to the facial validity of the statute, the challenge to the statute in these two cases is identical. With respect to the application of the statute, petitioners do not explicitly argue that Section 632-a is unconstitutional "as applied" to *Stranger In Two Worlds*, but assert that the book is "a serious and provocative study of life in a woman's prison" which "did not seek to 'exploit' the crime of which [Ms. Harris] was convicted", and that the statute's "broad sweep" wrongfully enfolds Ms. Harris's book. Petition at pp. 2-3. Petitioners' purported as applied challenge to the statute does not raise any separate, novel, or significant issue to warrant this Court's review.

Therefore, it is appropriate for the Court to defer consideration of the petition until a decision is rendered in *Simon & Schuster*. If Section 632-a is upheld by this Court in *Simon & Schuster*, the Court should deny this petition because no significant issue will remain in *Children of Bedford*. If Section 632-a is overturned only as applied to Simon & Schuster, the Court should also deny the petition here. If the statute is struck down on its face in *Simon & Schuster*, then the Court should vacate the judgment of the New York Court of Appeals and remand the case to that court for further proceedings consistent with this Court's opinion in *Simon & Schuster*.

CONCLUSION

The consideration of the petition for writ of certiorari should be deferred pending the decision in the *Simon & Schuster* case.

Dated: New York, New York
September 16, 1991

Respectfully submitted,

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